IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Edith Borel, et al.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
Boris Pavichevich, et al.	:	**No. 01-1395**

Norma L. Shapiro, S.J. December 4, 2001

This diversity action arose when plaintiff Edith Borel left this jurisdiction for the warmer climes of Florida and allegedly slipped and fell in the bathtub of a condominium she rented. The defendants -- a condominium association, owner, and rental agents – have moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer to the Middle District of Florida. At oral argument, plaintiffs agreed to the dismissal of Defendant Sandcastle II Condominium Association. The action against the remaining defendants will be transferred under 28 U.S.C. § 1406 to the Middle District of Florida, where it could have been brought.

I. BACKGROUND

Three times in the winter of 1999, defendant Marco Beach Rentals, Inc., placed an advertisement two inches by two and a half inches in The Philadelphia Inquirer and the Pittsburgh Post-Gazette. The advertisement read:

> **Marco Island, Florida**
> **You're Getting Warmer.**
> Just think.
> You could be enjoying sunny beaches, balmy breeze & breathtaking sunsets instead of wind, sleet & snow. Sound good?

> Then call us today for our listing of beachfront condos, waterfront homes & more.
> Now, aren't you warmer already?

The advertisement listed Marco Beach Rental's address in Florida, and provided a toll free telephone number and email address.

Plaintiff Edith Borel alleges she agreed to rent a condominium[1] after reading this advertisement in the Philadelphia Inquirer. Plaintiffs signed an agreement to rent condominium unit #606, located at 720 South Collier Boulevard, Marco Island, Florida, for one month, from March 1 through April 1, 1999.[2]

Borel alleges she slipped and fell while taking a shower in the condominium unit bathtub because its bathmat was not securely fastened. It is claimed that this fall caused her severe injuries, and caused both plaintiffs to expend significant sums for medical expenses. Mr. Borel seeks damages for loss of consortium.

II. DISCUSSION

The court has jurisdiction over the subject matter under 28 U.S.C. § 1332. Defendants, citizens of Illinois and Florida, are diverse from plaintiffs, citizens of Pennsylvania, and the amount

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[1]The condominium is apparently jointly owned by the Pavicheviches, who are members of the defendant Sandcastle II Condominium Association. Marco Beach Realty and Marco Beach Rentals were engaged by the Pavicheviches to rent the condominium. The Marco Beach defendants are entities whose relationship to each other is not clear to their counsel, and therefore is unknown to the court. For the purposes of this memorandum and order, the court treats the Marco Beach defendants as the same entity.

[2]Defendant Sandcastle II attached to its brief a copy of the rental agreement, signed by the Borels on January 27, 1999.

in controversy exceeds $75,000. Each defendant moves for dismissal for lack of personal jurisdiction, and, in the alternative, for transfer to the Middle District of Florida. As the Marco Beach defendants are agents of the Pavicheviches, their actions may be imputed to their principals for jurisdictional purposes. See Mellon Bank PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1226 n.5 (3d Cir. 1992). Once a defendant asserts a jurisdictional defense, the burden of proof rests with the plaintiff, see Provident Nat'l Bank v. California Federal Sav. & Loan Ass'n., 819 F.2d 434, 437 (3d Cir. 1987), to allege facts sufficient to establish personal jurisdiction. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

This court exercises personal jurisdiction in diversity actions to the extent allowed by Pennsylvania law, as constrained by the 14th Amendment to the United States Constitution. Fed.R.Civ.P. 4(e); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689-90 (3d Cir.)(per curiam), cert. denied, 498 U.S. 847 (1990). This two part jurisdictional inquiry is made more simple in Pennsylvania, as the long-arm statute's reach is coextensive with the due process clause. See North Penn Gas, 897 F.2d at 690.

Personal jurisdiction may be either specific or general. Specific jurisdiction applies where the plaintiff's cause of action "arises out of or relates to" the defendant's forum related activities. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8 (1984). General jurisdiction is implicated where the claim arises from the defendant's non forum-related activities: the defendant must "show significantly more than mere minimum contacts." Provident National Bank, 819 F.2d at 437.

A. Specific Jurisdiction

This court may exercise specific jurisdiction over the defendants if: (1) the action arises out of the defendants' contact with this forum; and (2) the defendants had constitutionally sufficient "minimum contacts" with the forum. Burger King Corp. v Rudzewicz, 471 U.S. 462, 474 (1985).

An action arises from defendant's contact with the forum if defendant should "'reasonably anticipate being haled into court there'" there. Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 151 (3d Cir. 1996), quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). However, the Court of Appeals has not precisely defined the necessary causal link between the purported contacts and the alleged injury when the injury involves out-of-state negligence. See New Jersey Sports Prods. v. Don King Prod., 1997 U.S. Dist. Lexis 23209, at *20-21 (D.N.J. Oct. 27, 1997) (noting lack of authority); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 267 (E.D.Pa. 1991) (same).

The majority of courts in this forum have adopted a definition of "arising out of" resembling proximate cause. See, e.g., Inzillo v. Continental Plaza, 2000 WL 1752121, at *3, 2000 U.S. Dist. Lexis 20103, at *8 (M.D.Pa. Nov. 27, 2000) (Munley, J.) (advertising and the establishment of a 1-800 telephone number did not "induce" Pennsylvania residents to travel to foreign resort); Driscoll v. Matt Blatt Auto Sales, 1996 WL 156366, at *2-3, 1996 U.S. Dist. Lexis 4153, at *6-7 (E.D.Pa. April 3, 1996) (Rendell, J.) (adopting causation test); Good v. Presbyterian Hosp. in New York, 1993 WL 131451, at *3, 1993 U.S. Dist. Lexis 5477, at *10 (E.D.Pa. April 26, 1993) (Hutton, J.) (phone call to Pennsylvania resident on transplant list did not give rise to claim for medical malpractice involving out-of-state

surgery); Gaylord v. Sheraton Ocean City Resort and Conf. Center, 1993 WL 120299, at *3, 1993 U.S. Dist. Lexis 5024, at *9 (E.D.Pa. April 15, 1993) (Hutton, J.) (slip and fall in Maryland did not arise from viewing advertisements in Pennsylvania); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. at 268-271 (brochures mailed to Pennsylvania did not give rise to injuries from accident in New Jersey). This definition, requiring the injury to be reasonable predictable from the contacts, ensures defendants can anticipate being "haled" into the forum court. World-Wide Volkswagen, 444 U.S. at 297. Those courts requiring a simple "but-for" connection between the contact and the injury, see, e.g., New Jersey Sports Prods., 1997 U.S. Dist. Lexis 23209, may occasionally, and inappropriately, extend jurisdiction when an injury is not the foreseeable effect of jurisdictionally-related conduct.

Defendants' advertisements were not the proximate cause of plaintiffs' injuries. It is true that Edith Borel probably would not have traveled to Florida but for the advertisement she read in the Philadelphia Inquirer. However, this advertisement was not uniquely targeted at Pennsylvania residents; it was part of a national campaign produced by defendants in an attempt to rent Florida property. The advertisement itself simply asks individuals to call for further information about the Florida property. Borel had to respond to the ad, initiate a series of conversations to reserve space, travel to Florida, rent the property, begin her stay, and take a shower in a tub negligently maintained by defendants, before plaintiff slipped because of this negligence. In short, as in Wims, 759 F. Supp. at 269, the link between the contacts and the injury is too attenuated for the latter to arise from the former.

Because whatever specific contacts there were did not cause the injury, the court need not decide whether the advertisement constitutes a constitutionally sufficient minimum contact.

B. General Jurisdiction

To establish general jurisdiction, a defendant must maintain "continuous and substantial" contacts with the forum state. Helicopteros Nacionales, 466 U.S. at 414. Advertising alone can satisfy this test, but the advertising must be more than solicitations placed in national publications, see Gehling v. St. George's School of Medicine, 773 F.2d 539, 542 (3d. Cir. 1985), or one advertisement directing its readers to transact business out of the forum. See Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982) (advertisement for referral placed in Martindale Hubbell Law Directory). However, advertising of a "certain quantity and quality" can establish general jurisdiction. Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786, 789 (E.D. Pa. 1986) (large scale promotions and media advertising over a long period of time sufficient to establish jurisdiction).

Defendants' advertisements were neither of sufficient quantity nor of the necessary quality to create general jurisdiction in this forum. According to the affidavit of William Malloy, Chief Operating Officer of the Marco Beach defendants, the only marketing in Pennsylvania by the defendants from 1999 to the present was a small text advertisement appearing in the Inquirer three times: November 28, 1999; December 26, 1999; and January 2, 2000; and in the Pittsburgh Post-Gazette during the same time period. These instances were part of a larger national campaign. Plaintiffs have cited no authority finding jurisdiction in such limited circumstances.

C. Venue

The venue statue in diversity actions provides that venue lies: (1) in a district where any defendant resides, if all defendants reside in the same state; (2) a district where a substantial part of the events or omissions giving rise to the claim occurred, or the property is located; or (3) a district where any defendant is subject to personal jurisdiction, if (1) and (2) do not apply. Here, § 1391(a)(2) confers venue in the Middle District of Florida, as the events giving rise to the claim took place there, and the property whose maintenance is in dispute is located in Marco Beach, Florida. 28 U.S.C. 1391(a)(3) does not apply if there are other venues available: venue in this district is inappropriate because the events giving rise to the action occurred almost exclusively in Florida. The action must be transferred, under 28 U.S.C. 1406(a), to the Middle District of Florida.

This court will deny defendants' motion to dismiss and exercise its discretionary power to transfer to the Middle District of Florida under 28 U.S.C. § 1406(a). This result is in the interest of justice as it prevents duplication of filing costs and possible statute of limitations problems arising from a dismissal at this point.

III. CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter.

2. The action does not arise out of the defendants' contacts with this forum: specific jurisdiction over defendants is lacking.

3. Defendants' advertisements are of neither the quantity nor quality to create "continuous and substantial" contacts of general jurisdiction.

4. Venue does not lie in this district: the action will be transferred to the Middle District of Florida.

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ORDER

AND NOW, this 4th day of December, 2001, on consideration of defendants' Motions to Dismiss, plaintiffs' response thereto, after a hearing November 20, 2001, and for the reasons given in the foregoing memorandum, it is **ORDERED** that:

1. Defendant Sandcastle II's Condominium Association's Motion to Dismiss (#13) is **DENIED AS MOOT.** Plaintiff's claims against Sandcastle II are **VOLUNTARILY WITHDRAWN.**

2. The remaining defendants' Motions to Dismiss or Transfer (#14 and #19), are **GRANTED IN PART**. Under 28 U.S.C. § 1406, this action is **TRANSFERRED TO THE MIDDLE DISTRICT OF FLORIDA FORTHWITH.**

Norma L. Shapiro, S.J.